

**From:** Larry Adams  
**Sent:** Thu 7/8/2004 9:34 AM  
**To:** Dabbs, Paul  
**Cc:**  
**Subject:** FW: June 7 Water Plan Advisory Committee Review Draft

Paul,

In the past months I was focused on finishing our draft Integrated Water Resources Plan and just recently perused the SWPlan Update 2004 of June 7, 2004.

Attached & below are about a dozen comments on my selective-readings of the Draft State Water Plan 2004. The attachment has two edits, circled with green font, on water rights Volume 1, Chapter 2, pages 28/29; and, for for Box 2-xx SB221, SB610, and AB901.

Below, the comments vary. I generally recommend performing text searches on the verb "is" to replace it with the word "was," especially in the past tense reference to 2003 events or milestones. For example, see Box 2-xx Recent Litigation in California Water Management.

Edit from "Sate" to "State" -- see Chapter 5, page 12, Resource Assumptions, second line.

Edit from "Improve" to "improve" -- see Chapter 5, page 13, Action Plan, 3rd bullet, first line.

Volume 2's (a) table of contents for Resource Management Strategies when compared to its (b)Introduction's (page 1) list of Resource Management Strategies and its (c) table of Strategy Investment Options, causes some comparison unease because without explanation these three lists share similar but not identical strategy titles.

Please rephrase "costs over about the 25-year period." -- see Volume 2, Introduction, page 4, bullet for Column 11, second sentence.

For Volume 2, Introduction, page 5, table of Strategy Investment Options' list: Desalination. Realign, --Brackish and --Ocean under one another so that this double-row of data more clearly conveys two distinct types of desalination values. In addition, use seawater, rather than ocean. Seawater embraces both the oceans and other saline waters such as the Salton Sea, a current project of DWR.

Volume 2, Urban Land Use Management, pages 1-2, uses the phrase "traditional development." Traditional development has historically been compounds. The Midwest's Dust Bowl, which prompted a vast migration from Midwestern parched lands to lands in the west, federal jobs concurrently provided paychecks and water infrastructure development for: settlements in the

west. Concurrently between 1919 (end of World War I) and 1987 (as imported water infrastructure rose to meet rising urban water demands), the mobile 20th Century land users favored: non-density. Also concurrently yet stemming from silver and gold rushes and open lands in the mid-19th Century and followed by the invention of the automobile, the 20th Century opened to a different type of travel, economy and development:: suburbs. Consequently, I encourage non-use of the phrase traditional development and instead suggest a replacement such as 20th Century development or post-modern development.

Volume 2, Water-Dependent Recreation, page 3, Impacts to Natural Resources. Consider language that is less condescending. [Example: Impacts to sensitive natural resources could be avoided by the rotational openings and closings of recreational areas. On site ecosystem educational programs could inform recreational users about which actions adversely impact fragile ecological processes.]

Volume 2, Watershed Management, page 7, Adaptive Management: last sentence, please check the use for "are often are" and change to "are often"

Above & attached are comments from my selective-readings of the Draft State Water Plan 2004 dated June 7, 2004.

LARRY ADAMS

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### **Public Trust Doctrine**

Rights to use water are also subject to the State's obligation under the Public Trust Doctrine as trustee of certain resources for Californians. The Public Trust Doctrine is a legal doctrine that imposes responsibilities on State agencies to protect trust resources associated with California's waterways, such as navigation, fisheries, recreation, ecological preservation, and related beneficial uses. In *National Audubon Society v. Superior Court of Alpine County*, the California Supreme Court concluded that the public trust is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands, and tidelands, surrendering such protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust. Thus, California agencies have fiduciary obligations to the public when they make decisions affecting trust assets.

In *National Audubon*, the court addressed the relationship between the Public Trust Doctrine and California's water rights system, and integrated them. The Court reached three major conclusions:

1. The State retains continuing supervisory control over its navigable waters, the lands beneath them, and the flows of their tributary streams. This prevents any party from acquiring a vested right to appropriate water in a manner harmful to the uses protected by the public trust. The SWRCB may reconsider past water allocation decisions in light of current knowledge and current needs.
2. As a practical matter, it will be necessary for the State to grant usufructuary licenses to allow appropriation of water for uses outside the stream, even though this taking may unavoidably harm the trust uses of the source stream.
3. The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."

Thus, while the State may, as a matter of practical necessity, have to approve appropriations that will cause harm to trust uses, it "must at all times bear in mind its duty as trustee to consider the effect of such taking on the public trust, (cite omitted) and to preserve, so far as consistent with the public interest, the uses protected by the trust."

### **Surface water rights**

California's system for surface water rights recognizes both riparian rights and appropriative rights. Riparian rights were adopted in California as a part of the English common law when California became a state in 1850. At that time, gold miners were already operating under their own system that recognized claims to water rights based on prior appropriation.

- Riparian. A riparian right is the right to divert, but not store, a portion of the natural flow for use based on the ownership of property adjacent to a natural watercourse. Water claimed through a riparian right must be used on the riparian parcel. Such a right is generally attached to the riparian parcel of land except where a riparian right has been preserved for noncontiguous parcels when land is subdivided. Generally, riparian rights are not lost through non-use. All riparian water users have the same priority; senior and junior riparian water rights do not exist. During times of water shortage, all riparian water users must adjust their water use to allow a diminished equal sharing of the available water supply.
- Appropriative. Under the prior appropriation doctrine, a person may acquire a right to divert, store, and use water regardless of whether the land on which it is used is adjacent to a stream or within its

watershed. When water in a stream is over-appropriated, a priority system determines which appropriators may divert water. The rule of priority between appropriators is "first in time is first in right." A senior appropriative water rights holder may not change an established use of the water to the detriment of a junior, including a junior's reliance on a senior's return flow. Acquisition of appropriative water rights is subject to the issuance of a permit by the SWRCB with priority based on the date a permit is issued. Permit and license provisions do not apply to pre-1914 appropriative rights (those initiated before the Water Commission Act took effect in 1914), but pre-1914 rights are still subject to reasonable and beneficial use, **and could be lost as a result of five years' nonuse**. Appropriative rights may be sold or transferred.

A sample reference see <http://www.swrcb.ca.gov/agendas/2003/january/0107-08.doc>

### ***Groundwater use and management***

California does not regulate the extraction and appropriation of groundwater with the exception of the 19 adjudicated groundwater basins and basins in which a local agency has obtained statutory authority to manage groundwater. Any overlying landowner in California has the right to build a well and extract groundwater as long as that groundwater is put to a reasonable and beneficial use. In 1903, the California Supreme Court rejected the English common law system of absolute ownership of groundwater, which allowed for unregulated pumping of groundwater. Instead the court adopted the rule of "reasonable use of percolating waters." This established the doctrine of "correlative rights and reasonable use" under which every landowner in the basin has a right to extract and use groundwater and that right is correlative with the rights of all the overlying landowners in the basin. Those correlative rights are not quantified until the basin is adjudicated. An overlying landowner's right is considered to be analogous to a riparian right to surface water. Groundwater can be appropriated-use on non-overlying lands if water is surplus to the reasonable needs of overlying owners. The *Baldwin v. Tehama* decision affirmed the authority of counties to regulate groundwater resources within their boundaries. Many local agencies and governments have prepared groundwater basin management plans under AB 3030.

### ***Tribal water rights***

Some Indian reservations and other federal lands have reserved water rights implied from acts of the federal government, rather than State law. When tribal lands were reserved, their natural resources were implicitly reserved for tribal use. Because reserved tribal rights were generally not created by state law, states' water allocations did not account for tribal resources. In the landmark *Winters v. U.S.* case in 1908, the U.S. Supreme court established that sufficient water was reserved to fulfill the uses of a reservation at the time the reservation was established. The decision, however, did not indicate a method for quantifying tribal water rights. Winters rights also retain their validity and seniority over State appropriated water whether or not the tribes have put the water to beneficial use. Only after many years did tribes begin to assert and develop their reserved water rights. In 1963 the U.S. Supreme Court decision *Arizona v. California* reaffirmed Winters and established a quantification standard based on irrigation, presupposing that tribes would pursue agriculture. Despite criticisms of the "practicably irrigable acreage" (PIA) quantification standard from various perspectives, the PIA standard provided certainty to future water development. Quantifying water needs in terms of agricultural potential does not accurately show the many other needs for water. Even urban water quantity and quality assessments that look at the adequacy of the domestic water supply and sanitation do not provide a complete picture of tribal water needs. A large part of the tribal water needs are for instream flows and other water bodies that support environmental and cultural needs for fishing, hunting, and trapping.